

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-6071

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

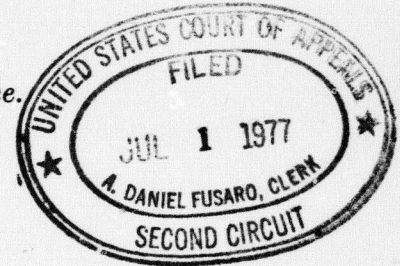
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P/S

PHILIP B. SCHWAB and MARY LOUISE SCHWAB,
Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK



**BRIEF FOR PLAINTIFFS-APPELLANTS
AND APPENDIX**

McDONOUGH, BOASBERG, HAMSHER,
HELLER & RAMM,
Attorneys for Plaintiffs-Appellants,
930 Walbridge Building,
Buffalo, New York 14202.

EDWARD HELLER,
of Counsel.

STEPHEN ERRANTE,
With him on the Brief.

PAGINATION AS IN ORIGINAL COPY

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PRELIMINARY STATEMENT

This action was commenced in the U.S. District Court for the Western District of New York by the filing of a Complaint on February 21, 1973. Thereafter, the defendant moved for a change of venue (March 5, 1973), and the plaintiffs moved to add a corporation, Schwab Brothers Trucking Co., Inc., as a party (May 1, 1973). While those motions were pending before the late Judge Henderson, defendant moved to dismiss the Complaint for failure to state a cause of action. After Judge Henderson's death, the case was transferred to Judge Burke, who, on May 30, 1974, granted the motion for a change of venue and the motion to dismiss the second cause of action, and denied the motion to add the corporate plaintiff.

The defendant renewed its motion to dismiss (September 13, 1974), and while that motion was pending, an order was granted on motion changing the venue to the Western District of New York (January 13, 1975).

The defendant's motion to dismiss came on for argument on May 12, 1975, before Judge Burke, who advised counsel that he intended to treat the matter as a motion for summary judgment to be decided on the papers before him. There the matter rested until February 23, 1977 when Judge Burke granted the defendant's motion.

On this appeal we argue that Judge Burke was in error in granting the defendant's motion for summary judgment and further, that he erred in denying our motion to add the corporate plaintiff.

STATEMENT OF THE CASE

Plaintiffs-Appellants appeal from an Order for Summary Judgment (A-1) dismissing a suit which, for lack of a better description, can be classed as an income tax refund claim, but which is, in actuality, an action for an accounting.

In 1964, the plaintiff, PHILIP SCHWAB, was the chief operating officer of Schwab Brothers Trucking Company, Inc., a heavy construction business engaged in road building and sewer construction in three states. The business had been started by the plaintiff and his brothers in 1948, with a borrowed dump truck as its only tool, and had been nurtured and nursed through years of struggle to become a business which in full blossom had hundreds of employees, myriad equipment and millions in annual billings.

The plaintiff and his brothers were lifelong residents of Buffalo; the corporate offices were in Erie County; the major portion of the plaintiff's business was done in Western New York and most importantly, all tax matters, individual and corporate, were handled through the Buffalo District Office of the Internal Revenue Service.

Commencing in the Fall of 1964, the plaintiff's business came into repeated contact with the collection division of the Internal Revenue Service because of difficulties connected with the payment of employee withholding tax. Through numerous telephone calls and personal meetings, the plaintiff became a familiar figure to the staff; the plaintiff developed an understanding of the office procedures and policies; and both sides ended up with a comprehension of the corporation's fiscal problems. Put another way, the Internal Revenue Service was a business partner.

Then, in 1965, the plaintiff's business was demolished by one uncaring

stroke of the defendant's pen. All the plaintiff's assets, wherever situated, were seized for sale with no warning and with no advance effort having been made to see what kind of arrangements could have been made to provide the plaintiff's corporation with an opportunity to survive.

Thereafter, the assets were sold, accounts receivable collected, a receiver appointed for the corporation, funds disbursed and arbitrarily attributed to one account or another; and with all of this being done to him and his corporation, the most vexacious facts concern two matters about which nothing was done:

- a. Despite an indictment and trial charging the plaintiffs with various felonies, the Internal Revenue Service has not to this day provided an inventory of the assets which were seized.
- b. There has never been an accounting of any sort, addressed to the plaintiff or his corporation, detailing the disbursement or attribution of funds realized through the sale of assets or collection of accounts receivable. (A-2,3,4)

Eventually, Schwab was acquitted of the criminal charges and at that juncture his state of affairs with the Government was still bathed in the confusion created by the Government's haphazard procedures.

This lawsuit, grounded on a letter which is formalistically styled a "letter of protest" (A-6,7), but which is in actuality a demand for an accounting, seeks to establish whether the Government does, in fact, owe the taxpayer a refund, an issue which, without an accounting, can only be the subject of surmise.

That accounting cannot be full and complete unless the corporate taxpayer is added as a party plaintiff, an application denied at an early stage of this proceeding.

As stated in the letter, plaintiff "...seeks to fully and finally resolve all of the tax matters on a corporate and personal level for all of the years involved rather than dealing with the problem on a piece-meal basis". (A-7)

POINT I

PLAINTIFF'S LETTER OF JUNE 26, 1972, CONSTITUTES AN INFORMAL CLAIM FOR REFUND THUS GIVING THE DISTRICT COURT JURISDICTION.

The validity of informal claims has long been recognized by our highest court. U.S. v. Kales, 314 US 186, 62 S.Ct. 214, 86 L.Ed. 132 (1941) The purpose behind any claim, formal or informal, is to permit the Commissioner to make an investment, to correct the claimed errors, if any exist, and to refund the amount due, if any, without being subjected to litigation, and if the disagreement persists, to limit the issues to be defended by him Carmack v. Scofield, 5th Cir., 1953, 201 F2d 360, 362. There have been numerous cases dealing with the issue of what constitutes an informal claim. However, each case must be decided on its own peculiar set of facts with a view towards determining whether, under those facts, the Commissioner knew or should have known that a claim was being made Newton v. US, 163 F. Supp. 614, 619, 143 Ct.Cl. 293, 300 (1958) The general test is whether "the Commissioner's attention should have been focused on the merits of the particular dispute" by the informal claim Angelus Milling Co. v. Commissioner, 325 U.S. 293, 297, 65 S.Ct. 1162, 1165, 89 L.Ed. 1619 (1945), as cited in Kuehn v. U.S., 480 F2d 1319, 1321 (1973). The general rule is qualified by three considerations which are to be present if the taxpayer wishes to rely on an informal claim.

First, there must be a written component Sicanoff Vegetable Oil Corp. v. US, 181 F. Supp. 265, 149 Ct.Cl. 278 (1960); Wrightsmen Petroleum Co. v. US, 35 F. Supp. 86, 96, 92 Ct. Cl. 217, 238 (1940), cert. denied 313 US 578, 61 S.Ct. 1095, 85 L.Ed. 1535 (1941); American Radiator & Standard Sanitary Corp. v. US, 318 F2d 915, 920, 162 Ct.Cl. 106 (1963).

Second, there must be some form of request for a refund. American Radiator, supra.

Third, there must be sufficient information available as to the tax and the years(s) to enable the Internal Revenue Service to commence, if it wishes, an examination into the claim. American Radiator, supra. Such information can be imputed to the Commissioner from the information available to, or knowledge of, revenue agents familiar with the case. For instance, in American Radiator revenue agents had audited the taxpayer's accounts and knew the precise amounts and years involved for the excess cost of replacing lost inventory. This was enough for the court to conclude that "a responsible employee of the Internal Revenue Service had notice fairly advising the Commissioner of the nature of the taxpayer's claim." (318 F2d at 921, 162 Ct.Cl. at 116)

Applying this three part test to the letter of protest, we argue that the requirements have been met. Initially we can point to a written component.

Secondly, although the letter does not state in flat languages "I demand a refund", it does express the fear that plaintiffs may have overpaid their tax liability. Further, an express claim could not be made. Plaintiffs have been compelled, since the seizure of all corporate assets and corporate books and records, to mark all Federal Income Tax Returns "tentative" or "not final" because, despite an indictment and trial charging the plaintiff, PHILIP SCHWAB, with various felonies, the Internal Revenue Service has not to this day provided an inventory of the assets which were seized, and there has never been an accounting, of any sort, addressed to the plaintiff detailing the disbursement or attribution of funds realized through the sale of assets or collection of accounts receivable, both of a corporate and personal nature. In essence, we maintain that the Internal Revenue Service should not be allowed to hide behind its own sloppy procedures. Considering that the purpose of a claim of refund is to enable the Commissioner to investigate the claim and limit the

issues which he must defend without giving the writing a "crabbed or literal reading", (see *American Radiator*, supra., at page 920) we submit that the letter of June 26, 1972, focuses the attention of the reader on the problem to be resolved.

The third element of an informal claim (and this reflects greatly on whether the Commissioner should have been aware of the meaning of paragraph number six of the letter) is that there be sufficient information available as to the tax and years involved so that the Internal Revenue Service may investigate if it desires. As stated previously this knowledge need not be written material but may be imputed to the Commissioner from the activity of revenue agents familiar with the case.

Here, the Internal Revenue Service became involved almost a year before the seizure, due to difficulties connected with the payment of employee withholding tax. After numerous meetings the Internal Revenue Service developed an understanding of the plaintiff's business and its fiscal problems. In fact, the Internal Revenue Service could, until the seizure, be characterized as a business partner. After the seizure the Internal Revenue Service was in a position superior to that of the other partner in that only it knew what was seized and to what accounts proceeds of sales and collected accounts receivable were being credited. By the time of the June 26, 1972, letter one can fairly conclude that "a responsible employee of the Internal Revenue Service had notice fairly advising the Commissioner of the nature of the taxpayer's claim". *American Radiator*, 318 F2d at 921, 162 Ct.Cl. at 116. In fact, the collection agent most involved with the plaintiffs' affair was on the witness stand at the criminal trial for more than four days.

Finally, any claim by the defendant that the claim for refund applies only to 1966 should not be taken seriously. First, while paragraphs one through five pertain primarily to 1966, paragraph number six starts a new sentence in which the plaintiffs assert their concern with all tax returns from 1966 through 1972 inclusive. Second, any ambiguity in the June 26th letter should be resolved in the plaintiffs' favor, at this stage, because it is the defendant which is in possession of all the relevant data, and it is the defendant which asserts that there are no issues of fact.

POINT II

PLAINTIFFS HAVE STANDING TO SUE AS TAXPAYERS

The argument against allowing the Schwabs standing to sue could be made as follows:

- 1) Sec. 7422(a) limits the right to bring a suit for refund of taxes, and the plaintiff is not a taxpayer within the meaning of the provision because
- 2) When Congress made provision for the recovery of any sum alleged to have been "excessive", it meant that the sum collected was in excess of the amount owed and that no one except the person owing it (against whom it was assessed) could raise this contention.
- 3) Further, the provisions for recovery of any sum "wrongfully collected" is limited to the same person who might allege that it was excessive.
- 4) Therefore, the plaintiffs are not taxpayers within the meaning of Section 7422(a).

The defendant's argument emphasizes form over substance. "The word 'taxpayer' should not be deemed to include only a person against whom a tax has been assessed. On the contrary, it should be construed so as to include any person who in fact paid the tax if such payment was not voluntarily made." MacMahon v. US, 172 F.Supp. 490 (D. Rhode Island 1959). See also Adams v. US, 380 F. Supp. 1033 (D. Mont. 1974) citing MacMahon. In the case at bar, Mr. Philip Schwab was the chief operating officer of a close corporation whose assets were seized to satisfy certain taxes asserted to be due. As is typical of most close corporations, Schwab Brothers being no exception, management and ownership are substantially identical to the extent that it is unrealistic to believe that the judgment of directors will be independent of that of stockholders. The significance of this is to point out the direct stake the Schwabs had in their corporation.

Schwab Brothers Trucking was not a corporation run by professional managers with thousands of shareholders. Rather, Philip Schwab was still putting his sweat and blood into his business. Any gains could be seen as going directly into his pocket, any losses directly affecting his income and lifestyle.

In short, the tax paid from the corporate assets was, in fact, paid by the plaintiffs. They, therefore, should have standing to sue as taxpayers.

POINT III

SCHWAB BROTHERS TRUCKING COMPANY, INC. HAS CAPACITY TO
SUE AND SHOULD, THEREFORE, BE JOINED AS A PARTY PLAINTIFF.

The New York Court of Appeals has set a standard for the validity of suit in the corporate name without board of directors approval in Rothman and Schneider, Inc. v. Beckerman, 2 NY 2d 493, 161 NYS 2d 118. There the court said:

Our previous decision does not mean that a corporation may not institute suit without a formal vote of authorization by the board of directors. Where there has been no direct prohibition by the board, then it has been held the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation. 2 NY 2d at 497, 161 NYS 2d 121 -

Further, while a normally functioning president is the only officer in which such a power vests, the secretary or treasurer will be deemed to have the authority to act and speak on behalf of the corporation where he has been the one actually managing the business. Id 2 NY 2d 498 and 161 NYS 2d 121.

In West View Hills, Inc. v. Lizau Realty Corp., 6 NY 2d 344, 446, 189 NYS 2d 863, 864, it was said that the presumptive power of the president is as it should be

...for unless the president actually or impliedly possesses such power the corporate interest may be prejudiced if not entirely destroyed. While, ordinarily, the power of the president of a corporation are often enumerated either in the articles of incorporation or in the By-Laws it is not usual to find in them any reference to the power to defend or institute litigation in the name of the corporation. However, such an omission does not mean that the power is non-existent for, in situations requiring the exercise of such power to preserve and protect the interests of the corporation, it will be implied.

On the record before the court, Philip Schwab was the chief operating officer of the corporation. In accordance with the cited cases, and in view of the fact that the record reveals no instance where the board of directors prohibited or failed to authorize Mr. Schwab's bringing of this suit, at the very least it should be presumed that he had the authority to do so.

Lastly, the cases previously cited by the defendant deal with the circumstance in which the corporate party has something to lose by becoming involved in litigation. In the instant case we are faced with a defunct corporation which has nothing to lose by becoming a party. The purpose served by adding Schwab Brothers Trucking Company, Inc. as a party plaintiff is to allow Mr. and Mrs. Schwab to fully effectuate any judgment in their favor, particularly when the motion to add a party was made early in the proceeding and the adding of the corporation as a plaintiff would not prejudice the Government's case.

CONCLUSION

Plaintiffs-Appellants have been left in a web of tangled finances that is not of their creation. This Court should give them an opportunity to litigate the question of whether their Government has unlawfully deprived them of monies that are or may be due them.

Respectfully submitted,

McDONOUGH, BOASBERG, HAMSHER, HELLER AND RAMM
EDWARD HELLER, OF COUNSEL
Attorneys for Plaintiffs-Appellants
Office and P.O. Address
930 Walbridge Building
Buffalo, New York 14202

STEPHEN ERRANTE, with him on the brief



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Docket Entries.

Civ-75-23 Philip B. Schwab & 1 v. United States of America

DATE 1975	NR.	PROCEEDINGS
Jan. 16		Filed original papers, docket sheet & certified copy of order transferring the action from Southern District of Florida.
Feb. 16		JS 5 made
Feb. 24		Motion by deft. to dismiss. Adj. until 3-10-75 Adj. until 3-24-75 at 2:00pm Adj. to 5-12-75 at 2:00pm
May 12		Motion by deft. to dismiss will be treated as a motion for summary judgment. To be finally submitted 3 wks from today.
June 2		Filed defts. motion for summary judgment.
1976		
1977		
Feb. 23		Filed Decision & Order granting summary judgment dismissing the F-185 complaint with prejudice on the grounds that there is no dispute as to any material fact, etc.-Burke, DJ Notice to Edward Heller & U.S. Atty.
23		JS 6 made
24		Filed judgment on decision of the Ct.-Clerk Notice & copies to Edward Heller & U.S. Atty.
Apr. 18		" Pltfs'. Notice of Appeal (copy mailed to U.S. Atty. and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to Mr. Heller)
May 20		Original papers, docket entries and Clerk's certificate mailed to Clerk, CCA

CLOSED

BEST COPY AVAILABLE



Reply Affidavit of Edward Heller.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

PHILIP B. SCHWAB AND
MARY LOUISE SCHWAB
6275 Ocean Boulevard
Ocean Ridge, Florida

Plaintiffs

-vs-

REPLY AFFIDAVIT

UNITED STATES OF AMERICA

Defendant

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

EDWARD HELLER, being duly sworn, deposes and says:

1. Attached hereto and made a part of this affidavit is a copy of a letter dated June 26, 1972, purporting to be a notice of claim on behalf of the plaintiffs, PHILIP and MARY LOUISE SCHWAB, and the proposed plaintiff, Schwab Brothers Trucking Company, Inc. The Court will note that more than six months elapsed before the within lawsuit was commenced. Further, attached hereto as Exhibit "B" is a letter dated July 12, 1972, from the defendant's Internal Revenue Service, disallowing the said claim.

2. The defendant contends, through the memorandum of law submitted by counsel, that the second cause of action fails to set forth a claim cognizable within the Federal Tort Claims Act. In response thereto it becomes necessary to set out the plaintiffs' claims regarding the circumstances which brings them before the Court.

In 1964, the plaintiff PHILIP SCHWAB was the chief operating officer of Schwab Brothers Trucking Company, Inc., a heavy construction business engaged in road building and sewer construction in three states. The business had been started by

Reply Affidavit of Edward Heller.

the plaintiff and his brothers in 1948, with a borrowed dump truck as its only tool, and had been nurtured and nursed through years of struggle to become a business which in full blossom had hundreds of employees, myriad equipment and millions in annual billings.

The plaintiff and his brothers were lifelong residents of Buffalo; the corporate offices were in Erie County; the major portion of the plaintiff's business was done in western New York and most importantly, all tax matters, individual and corporate, were handled through the Buffalo District Office of the Internal Revenue Service.

Commencing in the fall of 1964, the plaintiff's business came into repeated contact with the collection division of the Internal Revenue Service because of difficulties connected with the payment of employee withholding tax. Through numerous telephone calls and personal meetings, the plaintiff became a familiar figure to the staff; the plaintiff developed an understanding of the office procedures and policies; and both sides ended up with a comprehension of the corporation's fiscal problems. Put another way, the Internal Revenue Service was a business partner.

Then, in 1965, the plaintiff's business was demolished by one uncaring stroke of the defendant's pen. All the plaintiff's assets, wherever situated, were seized for sale with no warning and with no advance effort having been made to see what kind of arrangements could have been made to provide the plaintiff's corporation with an opportunity to survive.

Thereafter, the assets were sold, accounts receivable collected, a receiver appointed for the corporation, funds disbursed and arbitrarily attributed to one account or another: and with all of this being done to him and his corporation, the most vexacious facts concern two matters about which nothing was done:

a. Despite an indictment and trial charging the plaintiffs with various felonies, the Internal Revenue Service

Reply Affidavit of Edward Heller.

has not to this day provided an inventory of the assets which were seized.

b. There has never been an accounting of any sort, addressed to the plaintiff or his corporation, detailing the disbursement or attribution of funds realized through the sale of assets or collection of accounts receivable.

Every witness but one who testified at the criminal trial was a resident of the Western District of New York. Carton upon carton of the plaintiff's corporate records and the Internal Revenue Service records reposed in the Western District of New York. The acts complained of occurred in the Western District of New York.

There is nothing whatsoever relating to this case that has any connection to the Southern District of Florida, where the plaintiffs now reside.

The second cause of action is a claim for the negligent destruction of a going business. The acts complained of in the second cause of action were performed by the Internal Revenue Service employees but it is not the acts themselves which give rise to the cause of action. It is the careless decision to act upon which the lawsuit is grounded.

3. The defendant contends, through the memorandum of law submitted by counsel, that the plaintiffs are attempting to bootstrap themselves into this venue by the expedient of adding the corporation as a plaintiff. The recitations complained of in paragraph numbered "2" hereof are adapted for the purpose of amplifying on the affidavit submitted in support of our motion to add a party. It is submitted that no jury should be asked to sort out the complex issues presented here without having all parties before it. As to whether the corporation has been dissolved, or whether a resolution of the board of directors is necessary for the corporation to join this litigation, the Court's attention is called to the closely held

Reply Affidavit of Edward Heller.

composition of the corporation which makes the latter issue academic, and the defendant's brief which demonstrates that the former problem is no problem at all.

EDWARD HELLER

Sworn to before me this

____ day of _____, 1973.

Exhibit "A" Annexed to Reply Affidavit of Heller.

June 26, 1972

Mr. John E. Foley, District Director
Internal Revenue Service
111 W. Huron Street
Buffalo, New York 14202

Re: Au:R:PP - Your letter of June 12, 1972

Dear Sir:

Please be advised that pursuant to the Treasury Department's regulations, my client protests the audit return for taxable year 1966 and

- (1) requests an appeal to the District Conference Staff
- (2) for Mr. and Mrs. Philip Schwab, 6275 Ocean Boulevard, Ocean Ridge, Florida
- (3) Au:R April 21, 1972 for the taxable year
- (4) 1966 on the ground that
- (5) tax payer does not agree with the schedule of income or the schedule of deductions and exemptions.
- (6) Further, as the Internal Revenue Service should be thoroughly aware, serious disputes exist as to my client's tax liability for every calendar year to the present and commencing in 1964 due to the Service's failure to keep adequate and proper records of the seizures made of my client's corporation's assets and the improper crediting of monies collected through tax sales. Further, as the Service is very well aware, monies have been collected which have not been credited to either the corporate or personal accounts of the tax payer. These are in dispute and for that reason no determination with respect to Mr. Schwab's tax liability for 1966, or any other year, can be realistically accomplished without a thorough review of the entire corporate and personal affairs of the tax payer and Schwab Brothers Trucking Company, Inc.

It is my client's position that the Service should join with him in an endeavor to fully and finally resolve all of the tax matters on a corporate and personal level for all of the years involved rather than dealing with the problem on a piece-meal basis.

- (7a) This protest was prepared by the undersigned,
- (7b) who states that he does not know personally that any statements of fact

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Exhibit "A" Annexed to Reply Affidavit of Heller.

Mr. John W. Foley, District Director

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June 26, 1972

contained herein are true and correct--it being the case that no factual determinations can be made as to the taxable year in question until the entire amount of my client's tax liability or credits is resolved.

Very truly yours,

HELLER AND RUM

Edward Heller

EH:mh

cc: Mr. Hill, Schaub

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Exhibit "B" Annexed to Reply Affidavit of Heller.

Address any reply to: 111 W. Huron St., Buffalo, N. Y. 14202

Department of the Treasury

District Director

Internal Revenue Service

Date: July 12, 1972	In reply refer to: Au:R:PP Tel. 842 3455
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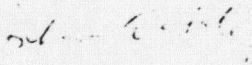
Mr. Edward Heller
Heller and Ramm
1330 Statler Hilton
Buffalo, New York 14202

Dear Mr. Heller:

We have written you previously and enclosed Publication 5 which points out how to file a proper protest. Taxpayers are Philip and Mary L. Schwab for 1966 and Philip Schwab for 1965 and 1967.

At the present time we are asking you again to file a protest in accordance with the enclosed Publication 5. We are giving you 30 days from this date in which to submit the protests. If protests are not properly submitted we have no alternative but to issue a statutory notice which will give the taxpayer 90 days to petition the Tax Court of the United States.

Very truly yours,


John E. Foley
District Director

Enclosure
Publication 5

EXHIBIT "B"

BEST COPY AVAILABLE

Notice of Motion.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

PHILIP B. SCHWAB AND
MARY LOUISE SCHWAB
6275 Ocean Boulevard
Ocean Ridge, Florida

Plaintiffs

-vs-

NOTICE OF MOTION

UNITED STATES OF AMERICA

Defendant

SIRS:

PLEASE TAKE NOTICE that, pursuant to Rules 21 and 22 of the Federal Rules of Civil Procedure, upon the annexed affidavit of EDWARD HELLER, sworn to the ____ day of _____, 1973, and the proposed Amended Complaint, the undersigned will move this Court at a motion term thereof to be held at the Courthouse in the City of Buffalo, New York on the 4th day of June, 1973, at 9:30 A.M. or as soon thereafter as counsel can be heard for an Order amending the Complaint in the above-entitled action to add as a plaintiff SCHWAB BROTHERS TRUCKING CO., INC.

DATED: Buffalo, New York
May 1, 1973

Yours, etc.,

HELLER AND RAMM
Attorneys for Plaintiff
Office and P.O. Address
1330 Statler Hilton Hotel
Buffalo, New York 14202

Affidavit of Edward Heller.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

PHILIP B. SCHWAB AND
MARY LOUISE SCHWAB
6275 Ocean Boulevard
Ocean Ridge, Florida

Plaintiffs

-vs-

AFFIDAVIT

UNITED STATES OF AMERICA

Defendant

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

EDWARD HELLER, being duly sworn, deposes and says as follows:

1. That I am the attorney for the plaintiffs PHILIP B. SCHWAB AND MARY LOUISE SCHWAB and as such am fully conversant of the facts and circumstances out of which this lawsuit has arisen.
2. That the plaintiff PHILIP B. SCHWAB was and is the chief corporate officer of Schwab Brothers Trucking, Inc., the business, which it is alleged was ruined by the acts of the defendant UNITED STATES OF AMERICA through its Internal Revenue Service.
3. That in reviewing the pleadings in the within matter prefatory to preparing papers in opposition to the defendant's motion for change of venue, your deponent came to the conclusion that the issues to be determined in the within matter required that the corporation be added as a party plaintiff primarily because any verdict in favor of the plaintiffs could not be fully effectuated if the corporate plaintiff were not a party to the lawsuit. Annexed hereto is the proposed Amended Complaint.

BEST COPY AVAILABLE

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Affidavit of Edward Heller.

WHEREFORE, your deponent prays that the Court grant an order amending the Complaint in the manner and form of the proposed Complaint or as the Court may direct.

EDWARD HELLER

Sworn to before me this

___ day of ___, 1973.

Proposed Amended Complaint Annexed to Affidavit of Heller.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

PHILIP B. SCHWAB AND
MARY LOUISE SCHWAB
6275 Ocean Boulevard
Ocean Ridge, Florida

and

SCHWAB BROTHERS TRUCKING CO., INC.
Buffalo, New York

Plaintiffs

PROPOSED AMENDED
COMPLAINT

-vs-

UNITED STATES OF AMERICA

Defendant

The plaintiffs, for their Complaint, allege as follows:

FOR A FIRST, SEPARATE AND DISTINCT CAUSE OF ACTION,
THE PLAINTIFFS ALLEGE:

1. That the individual plaintiffs and each of them are citizens of the United States of America and residents of the State of Florida residing at 6275 Ocean Boulevard, Ocean Ridge, Florida.
2. That the plaintiff, SCHWAB BROTHERS TRUCKING, INC., no longer has a principal place of business, but that at all times hereinafter material, it filed tax returns in respect of which claim is made with the Internal Revenue Service Office located in Buffalo, New York in the Western District of New York.
3. That this cause of action is for a determination pursuant to Title 26 of the United States Code of credits, overpayments and refunds due the plaintiff and all of them from the defendant, UNITED STATES OF AMERICA, regarding the income tax due and owing upon the plaintiffs' income for the years 1964 through 1972 inclusive.
4. Upon information and belief, that in or about the year 1964, the plaintiff, PHILIP B. SCHWAB, was a corporate officer and shareholder in a business commonly known as Schwab

Proposed Amended Complaint Annexed to Affidavit of Heller.

Brothers Trucking Co., Inc., a corporation duly organized and existing under and pursuant to the laws of the State of New York.

5. Upon information and belief, that during the said year and thereafter, the Internal Revenue Service of the United States of America, acting through its Buffalo District Office, caused or contributed to, the financial failure of said business by the manner and means through which the defendant's Internal Revenue Service went about the collection of certain taxes asserted to be due and owing by the corporation.

6. Upon information and belief, that commencing in said year and thereafter, the defendant through its Internal Revenue Service seized all of the assets of the said corporation and collected proceeds of various indebtednesses due and owing the corporation and ever since that time held said assets and said monies without ever accounting to the plaintiffs or any of them with respect to the property.

7. Upon information and belief, that at all times material, the plaintiffs and all of them filed Federal Income Tax Returns labeled variously "tentative" or "not final" in which no claim was made with respect to the tax due, if any, or the refund due, if any, because of their lack of knowledge as to the exact financial position respecting said assets as between the parties, and because the seizure of assets heretofore alleged was accompanied by a seizure of all of the corporate books, records and documents.

8. That said information is solely and exclusively with the possession of the defendant and the plaintiffs have not been or are not now in a position to fully and fairly state the amount of their claim for either credits, adjustments or over-payments, and will not be in a position to do so until the determination of the cause of action herein alleged.

BEST COPY AVAILABLE

Proposed Amended Complaint Annexed to Affidavit of Heller.

9. That a claim for credits or refunds was filed on June 26, 1972, setting forth the plaintiffs' position with respect to all tax matters then and there existing between the parties and that such claim was disallowed on July 12, 1972.

10. That more than six months have elapsed and less than two years from the time of the filing of said claim and its disallowance and that the cause of action herein is based upon the claim for refund or credit made therein.

FOR A SECOND CAUSE OF ACTION, THE PLAINTIFF, PHILIP B. SCHWAB, ALLEGES AS FOLLOWS:

11. Repeats and realleges allegations contained in paragraphs numbered "1" through and including "5" of this Complaint as though hereinagain fully set forth.

12. That the manner and means by which the defendant through its Internal Revenue Service went about the seizure of the plaintiff's assets displayed an intentional or reckless disregard of the plaintiff's constitutional rights, and further, was in violation of the defendant's own Internal Revenue Service's rules and regulations respecting the manner in which asserted tax deficiencies were to be collected.

13. That as a result thereof, the plaintiff, PHILIP B. SCHWAB'S business was irreparably destroyed and his livelihood taken from him, all to his damage in the sum of FIVE MILLION DOLLARS (\$5,000,000.00).

WHEREFORE, the plaintiffs demand judgment as follows: in their first cause of action, the plaintiffs demand judgment determining the amount of overpayment, credit or refund due them for the taxable years 1964 through 1972. On the second cause of action, the plaintiff, PHILIP B. SCHWAB, demands judgment for FIVE MILLION DOLLARS (\$5,000,000.00) with interest and together with the costs and disbursements of this action.

DATED: Buffalo, New York
May 1, 1973

EDWARD HELLER
HELLER AND RAMM
Attorneys for Plaintiffs
Office & P.O. Address
1330 Statler Hilton
Buffalo, New York 14202

Plaintiffs demand a trial by jury.

Order.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PHILIP B. SCHWAB and MARY
LOUISE SCHWAB,

Plaintiffs

- vs -

CIVIL 1975-23

UNITED STATES,

Defendant

Edward Heller
1330 Statler Hilton Hotel
Buffalo, N.Y. 14202
Attorney for plaintiffs

Richard J. Arcara
United States Attorney
for the government
(Scott P. Crampton, Assistant Attorney General,
Jerome Fink, David J. Curtin, Attorneys,
Department of Justice, Washington, D. C. 20530,
of counsel)

By motion with supporting papers filed June 2, 1975
the defendant moves for summary judgment. On due consideration
it is hereby

ORDERED that summary judgment is granted dismissing the
complaint with prejudice on the grounds that there is no
dispute as to any material fact. The defendant is entitled
to summary judgment as a matter of law. Costs to defendant.


HAROLD P. BURKE
United States District Judge

February 23 1977.

Decision.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PHILIP B. SCHWAB and MARY LOUISE
SCHWAB, 6275 Ocean Boulevard,
Ocean Ridge, Florida,

Plaintiffs

- vs -

CIVIL 1973-84

UNITED STATES OF AMERICA,

Defendant

Edward Heller
1330 Statler Hilton Hotel
Buffalo, N.Y. 14202
Attorney for plaintiffs

David J. Curtin
Trial Attorney - Tax Division
Department of Justice
Washington, D.C. 20530
Attorney for defendant

Following the death of Judge Henderson, this case came to the undersigned on or about March 27, 1974. At his death Judge Henderson had pending before him certain motions which are discussed below.

The complaint was filed February 21, 1973. It sets forth two causes of action. The first cause of action is a claim for refund of taxes for the taxable years 1964 through 1972. The second cause of action is an action for damages based upon alleged intentional

Decision.

or reckless disregard of the plaintiffs' constitutional rights, and further, a violation of Rules and Regulations of the Internal Revenue Service. It asserts that the business of Philip B. Schwab, one of the plaintiffs, was irreparably destroyed and his livelihood taken from him, resulting in damages of five million dollars.

By motion filed March 12, 1973, the defendant moved to dismiss the complaint for improper venue. The defendant served notice that it would bring on the motion for a hearing on April 9, 1973.

Before that motion was decided, the plaintiffs, by notice of motion filed May 3, 1973, moved for an order allowing amendment of the complaint to add as a plaintiff, Schwab Brothers Trucking Company, Inc. The notice of motion stated that motion would be brought on for argument on June 4, 1973.

Before either of the above motions was decided, the defendant, by motion filed June 22, 1973, returnable June 25, 1973, moved to dismiss both causes of action. Said motion to dismiss had been filed June 5, 1973 but the notice of motion, fixing the date of argument on June 25, 1973, was not filed until June 22, 1973.

Decision.

All of the motions remained undecided at Judge Henderson's death.

The defendant on June 5, 1973 filed its first memorandum in support of its first motion to dismiss. The defendant on June 13, 1973 filed its second memorandum. This was in opposition to plaintiffs' motion to amend the complaint. The plaintiffs on June 23, 1973 submitted their first memorandum in opposition to the defendant's motion to dismiss for lack of proper venue. On August 8, 1973 the defendant filed its third memorandum. This was a memorandum to supplement its two previous memoranda. On August 13, 1973 the plaintiffs filed their second memorandum. This was in reply to defendant's supplemental memorandum.

In the first paragraph of the complaint the plaintiffs allege that they are residents of Ocean Ridge, Florida. The first cause of action is one for refund of taxes for the taxable years 1964 through 1972. The second cause of action is an action for damages. The complaint makes no reference to the claimed basis of jurisdiction of either cause of action. No jurisdictional basis for a damage suit against the United States for five million dollars is alleged and none may be inferred.

Decision.

Under 28 U.S.C. Section 1346 (a) (1), the District Courts have original jurisdiction over any civil action against the United States for the recovery of an Internal Revenue tax alleged to have been erroneously or illegally assessed or collected. The complaint alleges (paragraph 8) that a claim for refund was filed on June 26, 1972 and that such claim was disallowed on July 12, 1972. The complaint alleges (paragraph 9) that more than six months and less than two years have elapsed from the filing of said claim and its disallowance and that the cause of action for refund is based on the claim for refund made in the complaint.

The first memorandum of the defendant submitted on June 5, 1973 was in support of defendant's first motion to dismiss. That motion, filed March 12, 1973, was for improper venue. The motion alleges in subparagraph (1) that plaintiffs reside in the State of Florida, (2) that their cause of action is for the refund of taxes, (3) that jurisdiction exists, if at all, for this action under 28 U.S.C. Section 1346(a) (1), (4) that 28 U.S.C. Section 1402(a) (1) provides that any civil action brought pursuant to 28 U.S.C. Section 1346(a) (1) may be prosecuted only in

Decision.

the judicial district in which plaintiffs reside, (5) that the action was filed in the Western District of New York which was not the jurisdictional district in which the plaintiffs reside and therefore that the action was not filed pursuant to 28 U.S.C. Section 1402(a)(1). The defendant's memorandum filed June 5, 1973 in support of its first motion to dismiss for improper venue is almost exclusively with the plaintiffs' failure to file a claim for refund and seeks to establish that such claim for a refund was filed. The memorandum states in closing that in the absence of a showing by clear and convincing evidence by plaintiffs that a claim for refund was timely filed, this court lacks jurisdiction over the subject matter of the action, citing 26 U.S.C. Section 7422(a). Whether the plaintiffs' did file a claim for refund and whether such claim for refund was denied, is beside the point as far as this discussion is concerned. They have properly alleged the jurisdictional requirements as to filing a claim for refund and denial thereof in paragraphs 8 and 9 of the complaint.

The plaintiffs' motion for an order allowing amendment of the complaint and the adding as a party

Decision.

plaintiff Schwab Brothers Trucking Company, Inc. was filed after the defendant had moved to dismiss for improper venue. The supporting affidavit of plaintiffs' attorney contains the following, "Your deponent came to the conclusion that the issue to be determined in the matter required that the corporation be added as a party plaintiff, primarily because any verdict in favor of the plaintiff could not fully be effectuated if the corporate plaintiff is not a party to the law suit." The corporation is a separate taxable entity. A complete determination of the issue whether the original plaintiffs are entitled to a refund of taxes, as claimed in their first cause of action, is no way dependent on whether the corporation has a valid claim or claims against the defendant. There is no basis for the assertion that any verdict in favor of the plaintiffs could not be fully effectuated if the corporation was not a party to the suit. The motion is a futile attempt to correct the defect of improper venue. The plaintiffs in their brief submitted June 23, 1973 assert "The court is confronted with the circumstance where logic and fairness dictate that the litigation be retained in this district while the defendant asks that it be transferred to the Southern District of Florida because a statute, 18 U.S.C.A. 1402(a)(1),

Decision.

ostensibly requires the accident of plaintiffs' residence to control venue." Logic and fairness do not determine venue. Congress has determined that by the statute, 18 U.S.C. 1402(a)(1). There is no basis for the plaintiffs' argument, nor do the plaintiffs suggest any legal authority, that the defendant had waived its defense of improper venue because of the asserted pre-litigation conduct of the defendant, specifically, the mailing by the Internal Revenue Service at Buffalo, New York, of certain letters to the plaintiffs residing in the State of Florida. The defense of improper venue was raised in the manner required by the federal rules.

Plaintiffs' motion for an order allowing amendment of the complaint and the adding as a party plaintiff, Schwab Brothers Trucking Company, Inc., is denied.

Defendant's motion to dismiss the plaintiffs' second cause of action for damages in the amount of five million dollars is granted for lack of subject matter jurisdiction.

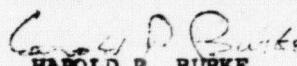
Defendant's motion to dismiss the plaintiffs' first cause of action for improper venue is denied. Under 28 U.S.C. Section 1404(a), for the convenience of

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Decision.

the parties and witnesses, in the interest of justice, the suit is transferred to the United States District Court for the Southern District of Florida, where it might have been brought. The Clerk is directed to send the complete file to the Clerk of the United States District Court of the Southern District of Florida.

ALL OF THE ABOVE IS SO ORDERED.


HAROLD P. BURKE
United States District Judge

May 30, 1974.

Motion to Dismiss.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

PHILIP B. SCHWAB and
MARY LOUISE SCHWAB
6275 OCEAN BOULEVARD
OCEAN RIDGE, FLORIDA,

Plaintiffs

v.

UNITED STATES OF AMERICA,

Defendant

CIVIL ACTION NO. CIV-1973-84

MOTION TO DISMISS

The defendant, United States of America, by its attorney, John T. Elfvin, Esquire, United States Attorney for the Western District of New York, respectfully moves this Court to dismiss both causes of action contained in plaintiffs' complaint with prejudice. The pertinent considerations and authorities on this matter are more fully set forth in the attached memorandum in support of this motion.

United States Attorney

Motion to Dismiss.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing
MOTION TO DISMISS has this 1st day of June, 1973, been
made upon counsel for the plaintiff by depositing a copy
thereof in the United States mail, postage prepaid, addressed
to:

Edward Heller, Esquire
Heller & Ramm
1330 Statler Hilton Hotel
Buffalo, New York 14202

JOHN A. FLANAGAN
Trial Attorney
Tax Division
Department of Justice
Washington, D. C. 20530

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Memorandum Annexed to Motion.

UNITED STATES DISTRICT COURT - Western District of New York

PHILIP B. SCHWAB and MARY LOUISE SCHWAB
6275 Ocean Boulevard
Ocean Ridge, Florida

MAY 23 7 55 AM '73

Plaintiffs

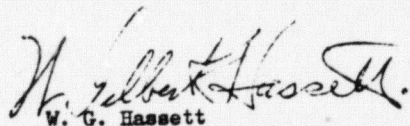
vs

UNITED STATES OF AMERICA

Civ. 1973-84

I, W. Gilbert Hassett, Assistant Chief, Audit Division, Buffalo District, Internal Revenue Service, have reviewed Audit Division records of the Buffalo District Internal Revenue Service pertaining to Philip B. Schwab and Mary Louise Schwab, 6275 Ocean Boulevard, Ocean Ridge, Florida, and do not find any records which would identify a Claim for Refund filed on behalf of the Schwabs for any year whatsoever, nor do I find any record whatsoever of a Claim for Refund on behalf of the Schwabs being rejected by the Buffalo District Audit Division, Internal Revenue Service.

Further, I have reviewed the records of the Buffalo District Audit Division, Internal Revenue Service, and find no record of a Claim for Refund filed on behalf of Schwab Bros. Trucking Company, Inc., 275 Mayville Avenue, Kenmore, New York, nor do I find any record of a Claim for Refund for Schwab Bros. Trucking Company, Inc. having been rejected by the Buffalo District Audit Division, Internal Revenue Service.


W. G. Hassett

Assistant Chief, Audit Division

INTERNAL REVENUE SERVICE
Buffalo District

Dated: May 21, 1973

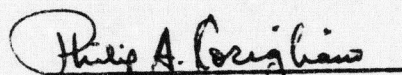
NOTARIZED:

Memorandum Annexed to Motion.

In presence of

State of New York)
County of Erie) SS:
City of Buffalo)

On this 21st day of May, 1973, before me personally appeared W. Gilbert Hassett, Assistant Chief, Audit Division, Buffalo District, Internal Revenue Service, to me personally known and known to me to be the same person described in and who executed the within instrument and he duly acknowledged to me that he executed the same as Assistant Chief, Audit Division, Buffalo District, Internal Revenue Service.


Notary Public
PHILIP A. CORIGLIANO
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN ERIE COUNTY
My Commission Expires March 30, 1975

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: Philip B. & Mary Louise Schwab
vs
United States of America
No. 77-6071

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

On the 29th day of June, 19 77
I mailed copies of a printed Brief & App-in
the above case, in a sealed, postpaid wrapper, to:

10 copies (by Air Mail) to: A. Daniel Fusaro, Clerk
United States Court of Appeals, Second Circuit
New Federal Court House, Foley Square
New York, New York 10007

3 copies (by Air Mail) to: Gilbert E. Andrews, Chief, Appellate Section
Att: Myron C. Bau, Assistant Attorney General
Tax Division, United States Department of Justice
Washington, D.C. 20530

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
about 4:00 P.M. on said date at the request of:

McDonovan, Boasberg, Hamsher, Heller & Ramm, Att: Edward Heller, Esq.

930 Walbridge Building, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

29th day of June, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1978